

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON: 14.11.2016
DATE OF DECISION :15.02.2017
CORAM:
THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.1132 of 2007

K.Chockalingam

... Appellant/Plaintiff

Vs

1.K.Mani
2.The Sub-Registrar,
No.2, Taluk Office Compound,
Thiruvannamalai.

... Respondents/Defendants

This appeal is filed under Section 96 of C.P.C. against the judgement and decree in O.S.No.49 of 2004, on the file of the District Court, Thiruvannamalai dated 29.06.2007.

For Appellant :N.C.Ashok Kumar
For Respondent-1 :Mrs.D.Chitra Maragatham
for Mr.T.R.Rajaraman
For Respondent-2 :Mr.Gunasekar Govt Advocate

J U D G E M E N T

The unsuccessful plaintiff in O.S.No. 49 of 2004, on the file of the District Court, Thiruvannamalai is the appellant in the above appeal.

2. The suit was filed seeking partition and separate possession of half share in the suit property. According to the plaintiff, he belonged to Ettivadi Village, Polur Taluk. The plaintiff and the 1st defendant are sons of one Kanna Udaiyar, who died in 1961 when the plaintiff was six months old and the 1st defendant was five years old.

3. The plaintiff would contend that Kanna Udaiyar was possessed of a tiled house and landed properties, which were sold by Ponnammal wife of Kanna Udaiyar, the mother of the plaintiff and 1st defendant during the year 1967. It is also the case of the plaintiff that on the death of Kanna Udaiyar, the plaintiff, the 1st defendant and their mother Ponnammal left the native village and settled in Padur village in Chengam Taluk. The plaintiff would claim that in 1971, they shifted to Thiruvannamalai Town and they started living jointly in Chetty Street at Thiruvannamalai.

4. It is claimed by the plaintiff that both the brothers joined as clerks in a wholesale shop (Mandy). The plaintiff would further allege that the income from the sale proceeds of the house property at Ettivadi village was used for the benefit of joint family consisting of plaintiff and 1st defendant. It is the further case of the plaintiff that he and his brother, 1st defendant were doing business jointly in the Market Committee till 1984 and the plaintiff started doing contract work in the name of the 1st defendant from 1984 and the 1st defendant was doing rice and paddy business.

5. According to the plaintiff, the suit property was purchased in the name of the 1st defendant out of the surplus income from the joint business proceeds of sale of family jewels and by joint borrowings by the plaintiff and 1st defendant for a consideration of Rs.30,000/-. The plaintiff would contend that since the 1st defendant was eldest male member of the family, the sale deed was taken in his name. It is also the case of the plaintiff that brothers continued to live jointly till marriage of the 1st defendant in the year 1989. It was also contended that a sum of Rs.30,000/- due to his father, was received by the 1st defendant in the year 1989. The plaintiff has got married in the year 1991 and started living separately after his marriage.

6. However, according to the plaintiff the suit property was enjoyed jointly. It is also the case of the plaintiff that the brothers out of their independent income have purchased the other properties, which belong to them absolutely. It is also further claimed that out of the surplus income from the joint business, four lorries were purchased in the name of the plaintiff and the 1st defendant in the year 1985. Out of the said four lorries two lorries were sold and two lorries stand in the name of the 1st defendant. On the above pleadings, the plaintiff claimed half share in the suit property.

7. The defendants resisted the suit contending that there was neither joint family fund nor surplus income from the joint business. It was further contended that the father of the plaintiff and the 1st defendant namely Kanna Udaiyar had married one Kalyaniammal, through whom he begot a son by name Chandran. When Kalyaniammal died Chandran was a young boy. Kanna Udaiyar married one Ponnammal as 2nd wife. Out of the said wedlock the plaintiff and the 1st defendant were born. Kanna Udaiyar had two brothers by name 1.Rama Udaiyar and 2.Lakshmana Udaiyar. The three brothers, Kannu Udaiyar Rama Udaiyar and Lakshmana Udaiyar had inherited only one ancestral tiled house from their father Periyappa Udaiyar. The said titled house was partitioned among brothers and Kanna Udaiyar got 1/3 share. According to the 1st defendant, apart from 1/3 share, Kanna Udaiyar was not possessed any other properties much less income

yielding landed property.

8. The fact that the Kanna Udaiyar died in the year 1961 was admitted and age of the plaintiff and 1st defendant at the time of death of Kanna Udaiyar was also admitted by the 1st defendant. Inasmuch as Kanna Udaiyar died without leaving any income yielding properties, his widow Ponnammal finding it difficult to save his three children sold the share of Kanna Udaiyar in dwelling house for Rs.1000/- and migrated to Padur. The claim that the family possessed jewels was denied. The claim of the plaintiff that family possessed ancestral properties was also specifically denied by the 1st defendant.

9. It is claimed by the 1st defendant that he had studied up to 9th standard and during the year 1971-72 he had migrated to Thiruvannamalai and started working in a shop belonging to Ramasamy Mudaliar on a monthly salary of Rs.200/- and in June 1972, the plaintiff and his mother Ponnammal came to Thiruvannamalai and started living with him in a rented house. It was the case of the 1st defendant that he was earning and maintaining his mother and his brother.

10. The 1st defendant would also narrate various avocations that he had during 1972 to 1975. He would claim that he had purchased the suit properties out of his own income and the plaintiff did not contribute as alleged by him for the purchase of the suit properties. The 1st defendant would contend that he became a registered contractor, since the plaintiff was not having any source of income, the 1st defendant had executed a power of attorney and allowed the plaintiff to do the contract work. On the above allegations, the 1st defendant has sought for dismissal of the suit.

11. On the above pleadings the learned District Judge Thiruvannamalai had framed the following issues:

- 1) Whether the suit property is a joint family property?
- 2) Whether the plaintiff is in joint possession of the suit property?
- 3) Whether the plaintiff is entitled to half share in the suit property?
- 4) Whether the plaintiff is entitled to the relief of permanent injunction?
- 5) To what other reliefs, is the plaintiff entitled to.

12. Upon a consideration of oral and documentary evidence, the learned District Judge, Thiruvannamalai, came to the conclusion that the plaintiff has not established his case that the suit property was purchased either out of joint family fund or out of surplus income of the joint business carried on by the plaintiff and the first defendant. The learned District Judge also found that the sale proceeds of the ancestral property,

namely a sum of Rs.700/- received by the widow of Kanna Udaiyar in the year 1970 could not have been utilised for the purchase of the suit property in the year 1981. On the above findings the learned District Judge, Thiruvannamalai, held that the suit property is not joint family property.

13. The learned District Judge also came to the conclusion that the plaintiff was never in joint possession of the suit property along with the 1st defendant. Making specific reference to the evidence of PW3 namely, mother of the plaintiff and the 1st defendant, the learned Principal District Judge, Thiruvannamalai also concluded that the plaintiff has not established his claim of either existence of joint family funds or existence of surplus income from the joint business said to have been carried on by the brothers. Upon such finding, the learned Principal District Judge, Thiruvannamalai, dismissed the suit.

14. Aggrieved by the same, the plaintiff has preferred the above appeal.

15. I have heard Mr.N.C.Ashok Kumar, learned counsel appearing for the appellant and Ms.D.Chitra Maragatham, learned counsel appearing for Mr.T.R.Rajaraman, learned counsel for the respondents.

16. The following points arise for determination in this appeal:

1. Whether the plaintiff has established his case that the suit property was purchased out of joint family funds or out of surplus income from the joint business said to have been carried on by the brothers?
2. Whether the plaintiff is entitled to half share in the suit property as claimed by him?
3. To what other relief, is the plaintiff entitled to ?

17. Mr.N.C.Ashok Kumar, learned counsel appearing for the plaintiff/appellant would heavily rely upon the documents namely, Ex.A2, the Power of Attorney executed by the 1st defendant in favour of the plaintiff and Exs.A3, A7 and A8 discharged promissory notes executed by both the brothers namely, the plaintiff and the 1st defendant and contend that there is enough and more evidence to show that the brothers were doing joint business and the fact that the plaintiff had been appointed as Power of Attorney Agent of the 1st defendant to carry on the contract work would it by itself shows that the plaintiff and the defendants were living together and were doing business jointly.

18. He would further contend that the discharge of the debts evidenced by promissory note namely Ex.A3 dated 14.11.1988,

Ex.A7 dated 06.07.1988 and Ex.A.8 dated 05.07.1988 would show that both the brothers borrowed money jointly and discharged their debts also. He would also take me through the evidence of PW3 Ponnammal, namely, the mother and PW4, Ramakrishnan, the vendor under the sale deed dated 19.8.1981 and would contend that the very fact, the plaintiff was present at the time of execution of sale deed by the vendors and the evidence of the mother, where she deposed that her sons were doing joint business would show that the plaintiff and the 1st defendant were doing business jointly and out of the income from the said joint business the suit property was purchased in the name of the 1st defendant.

19. I am unable to agree with the contention of the learned counsel for the following reasons:

In so far as the evidence of PW4 Ramakrishnan is concerned, in Chief examination he would depose that one Gandhi Chettiar, Chockalingam (Plaintiff) Mani (first defendant) and one Arumuga Gounder were present for negotiations. However, in his cross-examination he would depose that the purchaser was the 1st defendant and Gandhi Chettiar paid the advance of Rs.1011/- and the sale deed was executed in favour of Mani. He would also depose that the recitals in the sale deed are correct and it was the 1st defendant, who brought the stamp papers.

20. Reading of his evidence, particularly, the cross examination, does not inspire the confidence of the Court. During his cross-examination he had deposed that the 1st defendant did not pay the balance sale consideration till date and in another place he would say that after the execution of sale deed, the 1st defendant had promised to pay the money later. The said witness would further depose that the 1st defendant had the cash of Rs.20,000/- in a cloth bag and he gave it to PW4 directly and after counting and verification of the amount, he PW4 signed the sale deed. This by itself shows that the said witness is not speaking the truth.

21. As regards the evidence of PW3, it should be immediately pointed out that her evidence is also not reliable. In her Chief Examination she would say that she had spent money received by sale of the house at Ettivadi village for the advancement of her children. She would further state that the suit property was purchased out of the joint business funds of the plaintiff and the 1st defendant, as well as by borrowing money from the third parties. In her cross-examination she had deposed that her husband's family had $\frac{3}{4}$ Kani land in the village apart from the suit house. She would also state that the lands were sold at Rs.3,000/- and she was given Rs.1000/- out of the sale proceeds. She would further state that the sale deed for the house was registered whereas the sale deed for the land was not registered.

22. It will be pertinent to point out here that PW3 in her Chief Examination has said that there is an ancestral property belonging to her husband, which is enjoyed by his cousins. During her cross-examination she would admit that her family had no jewels that she had spent a sum of Rs.700/- for house-hold expenses and for her children. Though she would claim that she and her younger son, the plaintiff came to Thiruvannamalai in 1972 and the plaintiff had started working with one Natarajan and he was paid a monthly salary of Rs.60/-, the said evidence is wholly unreliable, inasmuch as the plaintiff was only 11 years in 1972 when he came to Thiruvannamalai. Reading of the entire evidence leads me to believe that she has tendered evidence as per the diktats of the plaintiff. She would also claim that all the lorries were purchased in the name of the 1st defendant, which is contrary to the case of the plaintiff himself. It should be pointed out that PW3 has attempted to project new dimension to the pleadings and has attempted to bring about the situation as if the defendant was doing business and the plaintiff was assisting him. She would even deny the ownership of the certain properties of the plaintiff which are in fact admitted by the plaintiff.

24. As regard the borrowings and discharge of promissory notes, it could be seen from the dates of the documents that they are subsequent to the purchase of the suit properties by the 1st defendant. Though there is some evidence to show that the brothers were living jointly, in my considered opinion that the said evidence is wholly insufficient to come to the conclusion that the brothers were doing joint business and out of the joint income, the property was purchased in the name of the 1st defendant.

25. Apart from the above, the 1st defendant has produced Ex.B2,B3 which are Passbooks, of his bank accounts for the period from 1975 to 2007 and 1974 to 1980. Several documents have been produced by the 1st defendant to show that he was having substantial income during the relevant period i.e. 1981 and 1982. On the other hand, there is no evidence on the side of the plaintiff to show that some joint business that was carried on at the relevant point of time and the surplus income was available for the purchase of the suit property. In the absence of such clear evidence, I am constrained to accept the findings of the learned Trial Judge with reference to the ownership of the property and as such the point No.1 is answered against the plaintiff/appellant.

Point No.2

26. In view of my finding that the plaintiff has not established that the suit properties were purchased out of neither joint family fund nor out of surplus income from the so called joint business, the plaintiff is not entitled to any share

much less the half share as claimed by him. The plaintiff has also sought for the relief of permanent injunction restraining the 2nd defendant from registering any document executed by the 1st defendant in respect of the suit property till the partition is effected and a permanent injunction restraining the 1st defendant from alienating the suit property till partition is effected by metes and bounds. In view of the rejection of main relief of partition itself, these consequential reliefs will have to be automatically rejected.

27. In fine, I do not find any irregularity or non-consideration of any evidence on record on the part of the learned District Judge, Thiruvannamalai in order to enable me to interfere with under Section 96 of C.P.C. In fine, the appeal is dismissed confirming the judgement and decree of the learned District Judge, Thiruvannamalai in O.S.No.49 of 2004 dated 29.06.2007. However, considering the relationship of the parties, there shall be no order as to costs in this appeal.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1.The District Judge, Thiruvannamalai.

2.The Sub Registrar

No.2 Taluk Office Compound
Thiruvannamalai

copy to

The Section Officer

VR Section

High Court Madras

+1 cc to the Government Pleader sr 9782

+1 cc to Mr.T.V.Krishnamachari Advocate sr 10015

+1 cc to Mr.T.R.Rajaraman Advocate sr 10339

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